(12)

No. 04-6432

MAR 3 1 2005

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ, *Petitioner,*

vs.

JAMES V. CROSBY, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

CHARLES J. CRIST, JR.
Attorney General of Florida
CHRISTOPHER M. KISE
Solicitor General of Florida

CAROLYN SNURKOWSKI
Assistant Deputy Attorney General
CASSANDRA DOLGIN*
Assistant Attorney General
**Counsel of Record*

OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, Florida 32399
(850) 414-3300

QUESTION PRESENTED

I. Whether a Rule 60(b)(6) motion seeking to relitigate the final disposition of a federal habeas petition as time-barred constitutes a prohibited "second or successive" petition under 28 U.S.C. § 2244(b)(1)? (Restated).

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A MOTION FILED PURSUANT TO RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE SEEKING TO RELITIGATE THE DISMISSAL OF A HABEAS PETITION AS TIME-BARRED CONSTITUTES A PROHIBITED "SECOND OR SUCCESSIVE" PETITION UNDER 28 U.S.C. § 2244(b)(1) 11

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No. 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,

Petitioner,

vs.

JAMES V. CROSBY,

Respondent.

OPINION BELOW

The opinion below is reported as Gonzalez v. Crosby, 366 F.3d 1253 (11th Cir. 2004) (en banc), and is published in the Joint Appendix ("J.A.") at pp. 22-125.

JURISDICTION

On April 26, 2004, the United States Court of Appeals for the Eleventh Circuit en banc affirmed the judgment of the district court dismissing petitioner's Rule 60(b) motion that sought review of the denial of Gonzalez's petition for writ of habeas corpus. Petitioner filed his petition for writ of certiorari on July 22, 2004, which the Court granted on January 14, 2005. Jurisdiction lies pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

This case involves 28 U.S.C. § 2244(b)(1), Rule 60(b) of Federal Rule of Civil Procedure, and 28 U.S.C. § 2254, Rule 11, which are set forth in the Joint Appendix. J.A. 126-129. The following rules are also involved:

Federal Rule of Civil Procedure 1: **Scope and Purpose of Rules**

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Federal Rule of Civil Procedure 81(a)(2):

These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. . . .

STATEMENT OF THE CASE

State Court Proceedings

Petitioner, Aurelio O. Gonzalez, pled guilty to committing three counts of robbery with a firearm, one count of armed burglary, and one count of armed kidnapping, in the Circuit Court of Dade County, Florida. The trial court sentenced petitioner on December 8, 1982,[1] to a term of ninety-nine (99) years imprisonment. See J.A. 2; Appendix To Response, Exh. A. A

[1] The Eleventh Circuit's opinion mistakenly reflects a sentencing date in 1992. J.A. 32.

direct appeal was not taken.[2] Petitioner's first state postconviction relief motion, brought pursuant to Florida Supreme Court Rule 3.850 and filed on August 8, 1994, was denied as "legally insufficient" on September 14, 1994. See J.A. 2; Appendix To Response, Exh. D. On January 18, 1995, the Florida District Court of Appeal for the Third District summarily upheld the denial of relief, and rehearing was denied on February 8, 1995. Id., Exh. H. Petitioner subsequently filed a successive motion for postconviction relief on November 25, 1996, outside the two-year state limitation period under Rule 3.850(b), which was denied on December 10, 1996. Id., Exh. I, J (respectively). The state intermediate appellate court upheld the lower court's ruling summarily on April 9, 1997. Rehearing was denied on May 7, 1997, Id., Exh. L, and the mandate issued on May 23, 1997.

District Court and Eleventh Circuit Panel Proceedings

Petitioner filed his petition for writ of habeas corpus in the United States District Court of Florida, Southern Division on June 23, 1997. J.A. 1. He raised one ground for relief, asserting that newly discovered evidence rendered his guilty pleas invalid. Id.; Petition, at 4. The State, in its response to a show cause order, asserted that the petition was time-barred and, in addition, the claim was procedurally defaulted. J.A. 2; Response To Order To Show Cause, at 4-5. The district court permitted petitioner to amend his petition, J.A. 2, which was filed on November 12, 1997. Id. Therein petitioner argued that newly discovered evidence demonstrated that his sentence was based upon another individual's criminal record. Id.; Amended Motion For Petition Of Habeas Corpus, at 1. In its response to the amended petition, the State reasserted its earlier arguments, and that petitioner's new claim was

[2] Any challenge to the voluntariness of Petitioner's guilty plea should have been asserted on direct appeal. State v. Thompson, 735 So. 2d 482, 485 (Fla. 1999).

not cognizable. J.A. 2; Response To Amended Petition For Habeas Corpus, at 2-4.

On July 16, 1998, the magistrate judge issued her "Report Re Dismissal §2254 Petition As Time Barred," recommending dismissal of the petition as having been filed outside of the one-year limitation period under 28 U.S.C. § 2244(d). J.A. 2. Petitioner filed objections to the recommendation. Id. The magistrate judge subsequently issued a "Supplemental Report" on August 17, 1998, again recommending dismissal of the petition as time-barred. Id. at 3. The district court entered its "Order Of Dismissal of §2254 Petition As Time Barred" on September 9, 1998. Id.

On September 23, 1998, petitioner filed his notice of appeal from the denial of habeas corpus relief, id., and filed a motion for a certificate of appealability ("COA"). Id. In an Order dated October 19, 1998, the district court granted COA without elaboration. Petitioner's appeal, docketed as No. 98-5545-F, was dismissed without prejudice on October 28, 1999, and the application for COA remanded "to the district court for determination of which issues merit appeal under the amended requirements of 28 U.S.C. § 2253(c)."

Petitioner thereafter filed a new application for COA with the district court, J.A. 4, which was denied on December 10, 1999. Id. Petitioner filed a new "Notice of Appeal" on January 12, 2000, attempting to appeal the denial of COA. Id. at 5. The Eleventh Circuit treated the notice of appeal as an application for COA and dismissed the appeal on April 6, 2000. The mandate issued on April 11, 2000. Id. Thereafter, under the original appeal that had been dismissed without prejudice on October 28, 1999, petitioner submitted to the Eleventh Circuit a "Petition For Rehearing," on or about April 18, 2000, requesting that the court of appeals reconsider the denial of COA in that first appeal. The petition was returned to petitioner unfiled with a letter dated April 26, 2000.

Nearly sixteen months later, on August 2, 2001, petitioner filed his "Rule 60(b) Motion To Amend Or Alter Judgment." J.A. 5. In that motion, petitioner contended that the district court's order of dismissal should be vacated pursuant to Artuz v. Bennett, 531 U.S. 4 (2000), decided by this Court on November 7, 2000, and Delancy v. Florida Department of Corrections, 246 F.3d 1328 (11th Cir. 2001).[3] The district court denied the motion on March 5, 2002, J. A. 5, believing that it was without jurisdiction to entertain the motion on the basis that petitioner had already appealed to the Eleventh Circuit. Petitioner filed a "Notice of Appeal" on April 9, 2002. J.A. 6. The district court denied COA on May 14, 2002. Id.

Under case number 02-12054-JJ, on August 15, 2002, a judge of the court of appeals granted petitioner a COA on the following issue: "Whether the district court erred in dismissing appellant's habeas corpus petition, 28 U.S.C. § 2254, as barred by the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996." Following briefing by the parties, a panel of the court of appeals issued its opinion on January 10, 2003, whereupon it ruled that "[t]he certificate of appealability previously granted in this case is QUASHED AS IMPROVIDENTLY GRANTED, and the appeal is DISMISSED." Gonzalez v. Secretary for the Florida Dept. of Corrections, 317 F.3d 1308, 1314 (11th Cir.), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003).

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[3] Petitioner apparently relies upon Delancy for the proposition that any successive motion for state postconviction relief is "properly filed" if filed. To the contrary, the Eleventh Circuit has held that an untimely successive state motion is not properly filed under § 2244(d)(2) if it does not meet certain exceptions to a timely filing requirement, Drew v. Department of Corrections, 297 F.3d 1278, 1285 (11th Cir. 2002), cert. denied, 537 U.S. 1237 (2003), a question left open in Artuz, 531 U.S. at 9 n.2.

En Banc Eleventh Circuit Appellate Proceedings

On January 27, 2003, petitioner filed a "Motion To Reconsider, Vacate, Or Modify" before the court of appeals. J.A. 10. That motion was denied as moot, while that court, en banc, on April 1, 2003, issued its order directing that the case be heard en banc, id., in conjunction with Lazo v. United States, No. 02-12483, and Mobley v. Head, No. 02-14224.[4] Gonzalez, 326 F.3d at 1176. The parties in the three cases were directed to address the following issues:

> 1) Is a certificate of appealability required before an appeal may be taken from the denial of a Rule 60(b) motion involving an order or judgment in a 28 U.S.C. § 2255[5] proceeding?
>
> 2) If so, should one issue in this case?
>
> 3) What standards or rules should govern Rule 60(b) motions involving an order or judgment in a 28 U.S.C. § 2255 proceeding. i.e., under what circumstances, if any, should such a motion be granted?
>
> 4) Was it an abuse of discretion for the district court to deny the Rule 60(b) motion in this case?

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[4] See Lazo v. United States, 314 F.3d 571 (11th Cir.), vacated for rehearing en banc, 326 F.3d 1175 (11th Cir. 2003) and Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003). The petition for writ of certiorari filed in the Mobley case, assigned case number 04-6914 before this Court, was denied on January 17, 2005. Certiorari was not sought in Lazo.

[5] Both Gonzalez and Mobley involved state prisoners that sought relief under 28 U.S.C. § 2254; Lazo pertained to a motion to vacate filed by a federal prisoner under 28 U.S.C. § 2255.

J.A. 10.

Subsequently, in a letter dated June 27, 2003, the court of appeals directed the parties to address the following issues by supplemental en banc letter briefs:

> I. "To what extent if any, and how, should the general principles underlying habeas and section 2255 cases guide, and the provisions of AEDPA inform, the decision of whether the grant of Rule 60(b) relief relating to a habeas or section 2255 judgment is available, and if available, is an abuse of discretion?"; and
>
> II. "By analogy to Calderon[v. Thompson, 523 U.S. 538 (1998)], and for the same or similar reasons, should this Court hold that, except in cases of actual fraud on the federal court which issued the judgment denying the habeas corpus petition or section 2255 motion, Rule 60(b) relief from judgment is available only 'to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."

J.A. 11.

The Eleventh Circuit heard individual oral argument in the three cases, then issued a consolidated opinion on April 26, 2004. J.A. 22. Therein, the en banc court first held that a habeas petitioner must obtain a certificate of appealability in order to appeal an order denying a Rule 60(b) motion. J.A. 35-43. In respect to Gonzalez specifically, the court of appeals determined that he was entitled to a certificate of appealability upon the issue of "[w]hat standards are applicable to Rule 60(b) motions in § 2254 cases, and in light of those standards was it an abuse of discretion for the district court to deny the motion?" J.A. 46. That court subsequently determined that Gonzalez's Rule 60(b)(6) motion

constituted a successive petition, as he was "attacking the merits of that decision [denying his habeas petition] - the term 'merits' referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations, an affirmative defense." J.A. 69.

SUMMARY OF ARGUMENT

Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") providing for habeas corpus reform specifically directed at curbing abusive tactics long associated with the writ that thwarted finality of criminal convictions and sentences. To effectuate that goal, Congress included provisions to eliminate excessive delay and repetitive filings, including (1) provisions restricting second or successive habeas petitions; and (2) limitations on the availability of appellate review. If Rule 60(b) relief is available as an end-run around these provisions, or as a vehicle to resurrect closed habeas cases, years after they were decided, Congress's policy goal of finality and closure is unquestionably defeated.

Gonzalez asks this Court to hold that Rule 60(b)(6) of the Federal Rules of Civil Procedure may be used to reopen closed habeas cases, solely on the basis of subsequent changes in decisional law occurring years after habeas relief was denied. Such an effort transgresses congressional intent, whereby Rule 60(b) would provide a mechanism by which a petitioner could obtain unbridled review of the final disposition rejecting habeas relief - constituting a second bite at the apple and giving license to boundless litigation. The general availability of Rule 60(b) then creates an end run to 28 U.S.C. § 2244(b), encouraging even greater abuse than that occurring prior to enactment of habeas reform through AEDPA. Accordingly, Rule 81(a)(2) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases preclude application of Rule 60(b) under these circumstances.

The fact that Gonzalez's habeas petition was denied as time-barred, rather than following a merits decision on his constitutional claims, does not change this result. Alike other Rule 60(b) motions, petitioner sought reconsideration of the district court's final judgment, a matter controlled by § 2244(b)(1). Here, the district court applied circuit precedent in good faith, holding that

Gonzalez's habeas petition was time-barred. A subsequent decision of this Court interpreting the habeas limitations statute does not strike at the integrity of that judgment and warrant avoidance of the bar of successive litigation under AEDPA.

Moreover, according absolute retroactive effect to rules pertaining to habeas proceedings would elevate the import of those rules beyond what this Court has held appropriate in relation to the underlying judgment of conviction and sentence ultimately under attack, i.e., new rules of constitutional procedural law. Accordingly, the Eleventh Circuit did not err in treating Gonzalez's Rule 60(b) motion as the functional equivalent of a successive petition for which he had not obtained authorization to bring.

ARGUMENT

A MOTION FILED PURSUANT TO RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE SEEKING TO RELITIGATE THE DISMISSAL OF A HABEAS PETITION AS TIME-BARRED CONSTITUTES A PROHIBITED "SECOND OR SUCCESSIVE" PETITION UNDER 28 U.S.C. § 2244(b)(1).

AEDPA precludes reconsideration of habeas petitions adjudicated on the merits raising the same claims presented in an earlier petition. Rule 60(b) allows otherwise. The issue before this Court is whether Congress' intent in subsequently passing AEDPA will be enforced,[6] or whether an expansive rule of civil procedure - non-specific to habeas corpus - stands as a vehicle to evade the legislative mandate narrowing the statutory writ. The correct result in upholding that intent is explained in Gonzalez; anything otherwise infringes on AEDPA's narrow class of circumstances permitting a second bite at the habeas apple.

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[6] The Senate passed S. 735 by a vote of 91-8, 141 Cong. Rec. S. 7803, 7857 (daily ed. Jun. 7, 1995), and agreed upon the conference report by the same margin. S. Conf. Rep. No. 49, 104th Cong., 2d Sess. (1996), 142 Cong. Rec. S. 3454, 3478. The House voted 293-133 in agreement on the conference report. H.R. Conf. Rep. No. 50, 104th Cong., 2d Sess. (1996), 142 Cong. Rec. H. 3605, 3617.

I.

Wholesale application of Rule 60(b) contravenes federal habeas corpus reform under the Anti-Terrorism and Effective Death Penalty Act of 1996, specifically 28 U.S.C. § 2244(b) as amended.

A. Congress intended to narrow the scope and availability of habeas corpus review with the passage of AEDPA.

Prior to 1996, congressional efforts to effect habeas reform spanned a period of no less than twenty years.[7] That tortured history finally bore fruit in Senate Bill 735, as designated Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, enacted on April 24, 1996.

As recognized by this Court in construing AEDPA and thus its import, the Act's primary purpose is to ensure greater finality in state and federal criminal judgments of convictions and sentences. See, e.g., Rhines v. Weber, ___ S.Ct. ___, 2005 U.S. LEXIS 2930 *14 (No. 03-9046) (Mar. 30, 2005); Miller-El v. Cockrell, 537 U.S.

[7] See Lonchar v. Thomas, 517 U.S. 314, 333 (1996) (citing the more than 80 bills proposed between 1986 and 1995 seeking to establish a statute of limitations for federal habeas petitions); see also H.R. Rep. No 242, Part 1A, 102d Cong. (1991) ("In recent years, the Congress has been urged to reform the Federal habeas corpus laws to make the process more efficient, promote finality, and ensure fairness."); S. 623, 141 Cong. Rec. S 4590, 4591-4592 (daily ed. Mar. 24, 1995) (summarizing habeas reform efforts in the Senate) (statement of Sen. Spector); H.R. 729, 141 Cong. Rec. H. 1400 (daily ed. Feb. 8, 1995) (recognizing Congress' consideration of habeas reform dating back to 1984) (statement of Rep. McCollum). The impetus for habeas reform arguably began in earnest in 1988, when Chief Justice William H. Rehnquist established the Ad Hoc Committee On Federal Habeas Corpus In Capital Cases, chaired by retired Associate Justice Lewis F. Powell, Jr. The Committee "was to inquire into 'the necessity and desirability of legislation directed toward avoiding delay and the lack of the finality' in capital cases which the prisoner had or had been offered counsel." Committee Report (hereinafter "Powell Report"), 45 Crim. L. Rep. (BNA) 3239 (1989).

322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); Tyler v. Cain, 533 U.S. 656, 661 (2001) ("AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications."); Williams v. Taylor, 529 U.S. 420, 436 (2000) (AEDPA's purpose is "to further the principles of comity, finality, and federalism.").

Legislative history supports the Court's interpretation. In the "Joint Explanatory Statement Of The Committee Of Conference," Congress expressly intended that Title I of AEDPA "incorporate[] reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 47, 104th Cong. 2d Sess. (1996), 142 Cong. Rec. H. 3305, 3333.[8]

"[J]udgments about the proper scope of the writ are 'normally for Congress to make.'" Felker v. Turpin, 518 U.S. 651,

[8] Prior efforts to reign in abuses associated with federal habeas corpus proceedings reflect the same concerns. For example, in recommending passage of H.R. 4018, the "Habeas Corpus Revision Act of 1994," the House Judiciary Committee wrote:

> The Committee believes that habeas corpus reform legislation is needed because the credibility of the criminal justice system has been tested by unnecessary delays, a seeming lack of finality of State criminal proceedings, and serious deficiencies in the provision of competent counsel to indigent defendants in death penalty cases.

H.R. 4018, 103 H. Rpt. 470, 103d Cong. (March 25, 1994). Nearly a year later, the House Judiciary Committee recommended passage of H.R. 729, the "Effective Death Penalty Act of 1995." 104 H. Rpt. 23, 104th Cong., 1st Sess. (Feb. 8, 1995). In so doing, the report provided that "H.R. 729 has been drafted to address a number of problems that presently exist in federal court criminal litigation .... [and] is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings." (under "Background and Need for the Legislation").

664 (1996) (quoting Lonchar, 517 U.S. at 323). In order to curtail the delay and repetitiveness associated with the writ, Congress exacted changes through AEDPA concerning, for example, the filing of multiple petitions, the time frame in which the petition must be filed, availability of appellate consideration, and the scope of review. See § 2244(b), § 2244(d), § 2253(c), and § 2254(d), respectively, as amended.

In respect to repetitive filings, Congress unquestionably intended that habeas petitioners have "one bite at the apple." See e.g., S. 735, 141 Cong. Rec. S 7656, 7657 (daily ed. Jun. 5, 1995) (statement of Sen. Dole); S. 735, 141 Cong. Rec. S 7803, 7809 (daily ed. Jun. 7, 1995) (statement of Sen. Kennedy). Section 2244(b)(1), unequivocally providing that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed," effectuates that goal. See also Randy Hertz, 2 Federal Habeas Corpus Practice and Procedure (Matthew Bender, 2001), § 28.4[a]. A "*successive claim* is a term of art referring to a claim that has been raised in a previous petition." 28 Moore's Federal Practice, § 671.10[2][a] (Matthew Bender 3d ed. 1997) (hereinafter "Moore") (emphasis in original). The plain language of § 2244(b)(1) is that further consideration of a claim previously raised is unequivocally prohibited. See Tyler, 533 U.S. at 661.

The Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents. . . ." Clay v. United States, 537 U.S. 522, 527 (2003). Statutory interpretation of habeas is informed "by the general principles underlying our habeas corpus jurisprudence." Calderon v. Thompson, 523 U.S. 538, 554 (1998). As the Eleventh Circuit recognized in Gonzalez, this Court's decisions reflect the narrowing of the availability of endless habeas litigation:

> [t]he evolution has been toward greater finality of judgments through increasingly tight restrictions on second or successive petitions. We have gone from

> the days of the more permissive ends of justice and abuse of the writ standards, see, e.g., *Sanders v. United States, 373 U.S. 1, 12, 83 S. Ct. 1068, 1075, 10 L. Ed. 2d 148 (1963)*; to the post-McCleskey era with its less permissive cause and prejudice standard, see, e.g., *McCleskey v. Zant, 499 U.S. 467, 493, 111 S. Ct. 1454, 1470, 113 L. Ed. 2d 517 (1991); Sawyer v. Whitley, 505 U.S. 333, 338, 112 S. Ct. 2514, 2518, 120 L. Ed. 2d 269 (1992)*; to the present post-AEDPA times, with a total ban on claims that were presented in a prior petition, *§ 2244(b)(1)*, and a near-total ban on those that were not, see *§ 2244(b)(2)*.

J.A. 47.

As demonstrated above, the statutory writ of habeas corpus accorded under § 2254, particularly upon enactment of AEDPA, is neither equivalent to nor otherwise analogous with general equity-based civil proceedings.[9]

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[9] Instructive is Congress' treatment through AEDPA of habeas law other than § 2244(b), which also demonstrates that Congress in no way intended for unrestrained equitable principles to govern habeas corpus litigation. For example:

Rule 9(a) of the Rules Governing Section 2254 Cases previously governed the filing of "delayed petitions." Rather than establishing a statute of limitations, Rule 9(a) was based upon the equitable doctrine of laches. 28 U.S.C. § 2254, Rule 9, Advisory Committee Notes (1976 Adoption). With the one-year limitation period created under AEDPA, Congress limited the courts' broad discretion in entertaining what typically were 11th hour filings in capital cases, see Powell Report, 45 Crim. L Rep. at 3240, establishing instead specific criteria for evaluating whether the petition was timely filed. §§ 2244(d)(1) and (d)(2); see also 28 U.S.C. § 2254, Rule 3(c) (effective December 1, 2004) (adding the provision that "[t]he time for filing a petition is governed by 28 U.S.C. § 2244(d)."); 28 U.S.C. § 2254, Rule 9 (effective December 1, 2004) (removing subsection (a) pertaining to "Delayed petitions."); Rule 9 Notes of Advisory Committee on 2004 amendments.

B. Rule 60(b), on the other hand, expansively permits review of final civil judgments, contradictory of the principles underlying AEDPA and this Court's habeas jurisprudence.

Federal habeas corpus, though a civil remedy, is different from general civil litigation. Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 269 (1978).[10]

Prior to passage of AEDPA, a habeas petitioner could obtain appellate review of the denial of relief upon the grant of a certificate of probable cause ("CPC"). 28 U.S.C. § 2253 (1994). Because there was no requirement that a specific issue warranting appellate review be identified, habeas petitioners were free to raise any or all issues brought in the underlying petition. Magouirk v. Phillips, 144 F.3d 348, 356-357 (5th Cir. 1998). That practice has changed under AEDPA. Although the standard for authorizing appellate review remains that as pronounced in Barefoot v. Estelle, 463 U.S. 880, 894 (1983), see Slack v. McDaniel, 529 U.S. 473, 483-484 (2000), the petitioner must obtain a certificate of appealability, requiring that petitioner make a substantial showing of the denial of a constitutional right *as to each issue* for which the certificate is granted. See 28 U.S.C. §§ 2253(c)(2) and (c)(3). AEDPA put an end to unbridled appellate review of frivolous appeals. See Barefoot, 463 U.S. at 892-893.

In furtherance of AEDPA's goals of comity, finality, and federalism, Congress also amended the scope of habeas review. 28 U.S.C. §§ 2254(d) and (e); see Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("AEDPA in general and § 2254(d) in particular focus in large measure on revising the standards used for evaluating the merits of a habeas application."). These changes, defining the standard upon which a claim for relief is reviewed, the deference to be accorded state court findings of fact, and the availability of federal evidentiary hearings, are consummate with this Court's discussion of the writ. See, e.g., Williams, 529 U.S. at 436; McFarland v. Scott, 512 U.S. 849, 859 (1994) ("A criminal trial is the 'main event' at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to 'relitigate state trial.'") (internal citation omitted); Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

[10] Habeas corpus cases are, in effect,

> hybrid actions whose nature is not adequately captured by the phrase 'civil action'; they are independent civil dispositions of completed criminal proceedings. James S. Liebman, 1 FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 2.1, at 3 (1988). The 'civil' label is attached to habeas proceedings to distinguish them from 'criminal' proceedings, which are intended to punish and require various constitutional guarantees. . . .

Smith v. Angelone, 111 F.3d 1126, 1130 (4th Cir.) (quoting Santana v. United States, 98 F.3d 752, 754-755 (3rd Cir. 1996)), cert. denied, 521 U.S. 1131 (1997).

Rule 60(b) takes no account of the differences. See, e.g., Pitchess v. Davis, 421 U.S. 482, 489 (1975) ("[E]ven if Rule 60(b) could be read to apply to this situation," the habeas exhaustion requirement applies to Rule 60(b) motions *notwithstanding that the civil rule is silent on the issue*). Thus Rule 60(b), without regard to the statutory command of 28 U.S.C. § 2254, provides a broad mechanism by which district courts acting in equity may relieve a party of a final judgment. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863 (1988).[11] "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons . . . ."[12] At issue is whether Rule 60(b) may be

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[11] While Congress did not amend Rule 60 upon promulgating AEDPA to reflect its nonapplication, see Petitioner's Brief (hereinafter "Pet.Br."), at 14-15, Fed.R. Civ.P. 81(a)(2) and Rule 11 of the Rules Governing Section 2254 Cases, do limit the applicability of the rules of procedure to the extent they conflict with habeas. And, this Court has interpreted Rule 81(a)(2) in the absence of Congressional language limiting the applicability of the civil rules in habeas proceedings. See Harris v. Nelson, 394 U.S. 286 (1969), and Pitchess v. Davis, 421 U.S. 482 (1975). In fact, prior to passage of AEDPA the courts were applying the abuse of the writ doctrine to Rule 60(b) motions. See infra, at 32 & n.26.

[12] The bases for relief include:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the

invoked upon a final disposition of a habeas petition, thus implicating subsequent adjudication where the same claims are presented, as compared to where review was not complete, for example, a dismissal for lack of exhaustion, Slack v. McDaniel, 529 U.S. 473 (2000), or that a claim was not addressed for lack of ripeness. Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). Because Congress through AEDPA intended to provide habeas petitioners with one opportunity to seek habeas relief, the distinction is significant. See infra, at 33-39.

Rule 60(b) relief "devitalize[s] the judgment." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944). The effect of granting a Rule 60(b) motion is to vacate the original judgment, thereby according the habeas petitioner precisely what § 2244(b)(1) precludes: relitigation of adjudicated claims previously presented. This was the very point the Court recognized in Calderon, 523 U.S. at 553, in discussing the effect of an appellate court recalling its mandate. In Gonzalez, the Eleventh Circuit succinctly reasoned that Calderon logically applies, as a motion to recall the mandate and a Rule 60(b) motion similarly are limited to addressing extraordinary circumstances. See Calderon, 523 U.S. at 550 (motion to recall the mandate); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 233 (1995) (Rule 60(b) motion). Calderon relied upon the fact that habeas cases are different. And that assessment is not an aberration, as a Rule 60(b) motion has been viewed as equivalent to a motion to recall the mandate. See, e.g., Sargent v. Columbia Forest Prods., 75 F.3d 86, 89 (2nd Cir. 1996); Burris v. Parke, 130 F.3d 782, 783 (7th Cir.), cert. denied,

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judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) also does not preclude "an independent action to relieve a party from a judgment, order, or proceeding...." While not the basis upon which Gonzalez sought to relitigate the denial of his habeas petition, such broad terms conceivably could be invoked to completely bypass habeas corpus review under § 2254 of a state court judgment.

522 U.S. 990 (1997); J.A. 58-59. And because entertaining a Rule 60(b) motion in a habeas proceeding constitutes reconsideration of the basis for the final judgment and presents the same claims as originally presented, it is irrelevant whether an adjudication reached the underlying constitutional claims raised in a habeas petition or that the petition itself was denied on a non-technical procedural basis, as time-barred or that the claims were denied as procedurally barred. Thus contrary to petitioner's assertion, Pet.Br. at 17, there is nothing "unrelated and inapposite" about Calderon as applied by the Eleventh Circuit.[13]

Review of the bases for relief from judgment under Rule 60(b) evidences why the rule infringes upon AEDPA's narrow class of circumstances which permit a second bite at the habeas apple:[14]

Under (b)(1) of Rule 60, a judgment may be reopened based upon mistake, inadvertence, surprise, or excusable neglect. Although § 2244(b)(1) precludes consideration of claims that were the subject of an earlier petition, Rule 60(b)(1) squarely would permit just that. Hilterman v. Furlong, 1998 U.S. App. LEXIS 22159 (10th Cir. Sept. 11, 1998) (unpublished) (reconsideration through Rule 60(b)(1) sought of underlying constitutional claims previously decided where counsel failed to file objections to magistrate's report and recommendation); see also Warren v. Garvin, 219 F.3d 111, 114-115 (2nd Cir.) (Rule 60(b)(1) the basis

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[13] In addition to the Eleventh Circuit in Gonzalez, J.A. 52-62, other circuit courts of appeal have adopted the logic in Calderon in the context of Rule 60(b) motions seeking review of the denial of a habeas petition. See, e.g., United States v. Winestock, 340 F.3d 200, 206 (4th Cir.), cert. denied, 540 U.S. 995 (2003); Buell v. Anderson, 48 Fed. Appx. 491, 495 n.2 (6th Cir. Sept. 24, 2002) (unpublished); Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2002), cert. denied, 539 U.S. 962 (2003).

[14] Rule 60(b)(3), permitting the reopening of a final judgment based upon fraud perpetrated upon the district court, does not undermine the balancing of interests in furtherance of finality made by Congress as opposed to the other clauses under Rule 60(b). See infra, at 39-40.

for reviewing whether untimely petition should be deemed timely), cert. denied, 531 U.S. 968 (2000).[15]

Rule 60(b)(2) "permit[s] a remedy when new evidence is discovered following the trial [and] . . . permits a court to set the judgment aside." 12 Moore, § 60.42[1][a]. This provision conflicts with 28 U.S.C. § 2244(b)(2)(B) two-fold by circumscribing the very limited circumstances in which newly discovered evidence may provide a basis for review of habeas claims, and evading the requirement that such claims be new. Rule 60(b)(2) has been invoked in habeas proceedings. See, e.g., Pridgen v. Shannon, 380 F.3d 721, 722 (3rd Cir. 2004), cert. denied, 2005 U.S. LEXIS 1587 (Feb. 22, 2005); Farris v. United States, 333 F.3d 1211, 1216 (11th Cir. 2003); Thompson v. Calderon, 151 F.3d 918, 920 (9th Cir. 1998) (en banc).

A void judgment may be reopened under Rule 60(b)(4). While a judgment is not void because it may be erroneous, the clause has been held applicable where the district court lacks jurisdiction over the parties or subject matter or acts in a manner inconsistent with due process. 12 Moore, § 60.44[1][a]. Clause (b)(4) has been invoked in habeas proceedings to attack a judgment denying relief upon, for example, a change in the law, Blackmon v. Armontrout, 61 Fed. Appx. 985, 986 (8th Cir. Mar. 12, 2003) (unpublished) (relying upon Godinez v. Moran, 509 U.S. 389 (1993)), cert. denied, 540 U.S. 846 (2003), the denial of a "full and fair" evidentiary hearing on an issue upon which relief was denied, McKnight v. White, 1995 U.S. App. LEXIS 28811 *2 (10th Cir. Oct. 16, 1995) (unpublished), and additional evidence in support of a constitutional challenge to the state court judgment. Williams v. Chrans, 42 F.3d 1137, 1138 (7th Cir. 1994). The clause clearly provides a means of circumscribing § 2244(b).

As relevant to habeas cases, under Rule 60(b)(5) relief from judgment may be granted where "it is no longer equitable that the judgment should have prospective application." The clause requires that there is "a significant change either in factual conditions or in law. . . . [and] [a] court may recognize subsequent changes in either statutory or decisional law." Agostini v. Felton, 521 U.S. 203, 215 (1997) (internal citation and quotation marks omitted); see also Polites v. United States, 364 U.S. 426, 438 (1960) (Brennan, J., dissenting) ("The decisions under Rule 60(b)(5) (adopted by the 1948 amendments to the Federal Rules of Civil Procedure) continue this history of equitable adjustment to changing conditions of fact and law."). Rule 60(b)(5) has been invoked in habeas cases to seek reconsideration based upon an intervening change of law. See, e.g., Phelps v. Alameda, 366 F.3d 722, 724 (9th Cir. 2004); Hess v. Cockrell, 281 F.3d 212, 214 (5th Cir. 2002).

Rule 60(b)(6) permits reopening a final judgment for "any other reason" exclusive of the bases for relief under clauses (1)-(5). The provision has been referred to as "a 'grand reservoir of equitable powers to do justice in a particular case.'" 12 Moore, § 60.48[1] (internal citation omitted). Both statutory interpretation and new decisional law provide fertile ground for seeking reconsideration of habeas denials that were based upon a circuit court's different understanding of AEDPA's provisions or a state court's procedural rules, or any change in this Court's constitutional jurisprudence. See, e.g., Hess, 281 F.3d at 214 (change in circuit decisional law); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir.) (citing Cooper v. Oklahoma, 517 U.S. 348 (1996)),

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[15] Moreover, though the postjudgment motion is not a substitute for an appeal, Fackelman v. Bell, 564 F.2d 734, 735 (5th Cir. 1977), to the extent that Rule 60(b)(1) is available in a habeas proceeding, it effectively would provide such a mechanism. Issues that should have been the subject of an appeal, including for example, whether the district court properly applied a procedural bar or rejected petitioner's claim for equitable tolling, could be raised as excusable neglect or inadvertence on petitioner's part or mistake by the district court. Thus whether COA was granted on any one of those issues, availability of Rule 60(b)(1) would provide a petitioner with no less than one opportunity for reconsideration. Similarly, Rule 60(b)(1) could be used to evade compliance with Rule 4(a)(5) of the Federal Rules of Appellate Procedure. Compare Dunn v. Cockrell, 302 F.3d 491, 492 (5th Cir. 2002), cert. denied, 537 U.S. 1181 (2003).

cert. denied, 525 U.S. 1024 (1998); Gee v. Shillinger, 1998 U.S. App. LEXIS 2644 (10th Cir. Feb. 18, 1998) (unpublished) (citing Schlup v. Delo, 513 U.S. 298 (1995)); Cornell v. Nix, 119 F.3d 1329, 1330-1331 (8th Cir. 1997) (same). To suggest otherwise, see Brief of Amicus Curiae Abu-Ali Abdur'Rahman, at 4-5, ignores such current practice and the impact that a "go ahead" from this Court will create, as well as the reality of the abuses associated with habeas litigation that Congress sought to curtail - both specific to capital litigation presenting abusive delay tactics, see Mercer v. Armontrout, 864 F.2d 1429, 1433 (8th Cir. 1988), as well as with non-capital cases where petitioners have zero incentive not to repetitively seek relief, and the impact that delayed relief has on the state's ability to retry a case. See Herrera v. Collins, 506 U.S. 390, 403 (1993) ("[T]he passage of time only diminishes the reliability of criminal adjudications.") (citing and quoting McClesky v. Zant, 499 U.S. 467, 491 (1991)). Given the passage of time and the loss of petitioner's guilty plea transcript, this case serves as a prime example.

Attempts to circumvent AEDPA also exist where a Rule 60(b) motion has been filed at the same time that a § 2244(b) request has been made, Rodwell v. Pepe, 324 F.3d 66, 68-69 (1st Cir.), cert. denied, 540 U.S. 873 (2003); United States v. Rich, 141 F.3d 550, 551 & n.1 (5th Cir. 1998), cert. denied, 526 U.S. 1011 (1999); Fierro v. Johnson, 197 F.3d 147, 150 (5th Cir. 1999), cert. denied, 530 U.S. 1206 (2000), with a motion to recall the mandate, Scott v. Singletary, 38 F.3d 1547, 1548 (11th Cir. 1994), cert. denied, 515 U.S. 1145 (1995), and after an unsuccessful appeal. Alley v. Bell, 392 F.3d 822, 826 (6th Cir. 2004). Each result in an unchecked abuse of the process.

Petitioner's own argument demonstrates the precise manner in which Rule 60(b) contravenes AEDPA. Petitioner contends that a habeas petitioner who previously had one round of habeas proceedings, having raised a challenge to a death sentence based upon mental retardation, could not subsequently reassert the claim citing Atkins v. Virginia, 536 U.S. 334 (2002), whereas those who

either had not previously brought a federal petition or those who did not raise the claim in the first petition could. Pet.Br. at 42. Petitioner would have the Court allow Rule 60(b) motions to raise a challenge to the underlying state judgment. Such a claim does not pertain to how the habeas petition was previously decided. And see infra, at 24-25. To the extent that petitioner would suggest a new rule of constitutional law renders the original habeas proceeding infirm, use of the rule nonetheless conflicts with § 2244(b). Congress established the circumstances for raising a change in law. § 2244(b)(2). That petitioner could not meet those requirements does not, however, leave him without recourse: a number of states provide a mechanism for the filing of successive collateral relief,[16] as well as a specific process with respect to new rules of constitutional law respecting the constitutionality of the death penalty.[17] In addition, if the state process were held insufficient, such a claim would likely be entertained as an original petition. See Felker, 518 U.S. at 664-665; see also Herrera, 506 at 417 (assuming that habeas relief would be warranted in a case where "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional" "if there were no state avenue open to process such a claim."). The same would likely apply to a successive claim raised under Roper v. Simmons, 125 S.Ct. 1183 (2005).

Despite the antagonistic goals of Rule 60(b) and § 2244(b), see 12 Moore, § 60.40, citing the dissent in this Court's dismissal

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[16] See, e.g., State v. Bonnell, 831 P.2d 434 (Ariz. Ct. App. 1992); Colo. Crim. P. 35(VI) & (VII) (2005); Thompson v. State, 887 So. 2d 1260, 1263 (Fla. 2004); 725 ILCS 5/122-1(2)(f) (2004); Cox v. State, 522 P.2d 173 (Kan. 1974); Mich. Ct. R. 6.502(a)(2) (2005); Miss. Code Ann. § 99-39-23(6); Wis. Stat. § 974.06(1) & (4) (2004).

[17] See, e.g., Code of Ala. § 13A-5-59 (2004); Colo. Rev. Stat. § 18-1.3-401(5) (2004); Fla. Stat. § 775.082(2) (2004); Miss Code Ann. § 99-19-107 (2004); Mo. Rev. Stat. § 565.040 (2004); Nev. Rev. Stat. § 176.555 (2004); N.M. Stat. Ann. § 31-18-14B (2005); Okla. Stat. § 701.15 (2004); S.D. Codified Laws § 23A-27A-14 (2003); Utah Code Ann. § 76-3-207(7) (2004); Wash. Rev. Code § 10.95.090 (2004).

in Abdur'Rahman v. Bell, 537 U.S. 88, 94 (2002) (Stevens, J., dissenting) and Judge Tjoflat's dissent in part below, J.A. 89-91, Pet.Br. at 18-19, petitioner argues that there is a functional difference between the two provisions supporting treating a Rule 60(b) motion as distinct from a successive petition. Id. at 17-29. He argues the civil rule aims at remedying problems in the habeas adjudication, whereas a second or successive petition is an attack on the underlying conviction and/or sentence. This is a distinction without a difference, putting form over substance.

This so-called distinction is easily manipulated as a matter of semantics to circumvent § 2244(b), revealing that a Rule 60(b) motion is in practice equivalent to a second or successive petition.[18]

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[18] A Rule 60(b) motion is filed

(1).- reasserting petitioner's claim brought in his denied habeas petition that his death sentence was unconstitutional because trial counsel rendered ineffective assistance based upon his failure to investigate petitioner's psychiatric history; or - asserting that the district court neglected to apply Wiggins v. Smith, 539 U.S. 510 (2003), did so erroneously, or misapplied § 2254(d), thereby improperly considering petitioner's claim of ineffective assistance and that the denial of the habeas petition should be reopened as a result.

(2).- reasserting petitioner's claim brought in his denied habeas petition that his conviction was unconstitutional under Batson v. Kentucky, 476 U.S. 79 (1986); or - asserting that the district court mistakenly applied 28 U.S.C. § 2254(e)(2), determined that petitioner was not entitled to an evidentiary hearing, and neglected to look to the facts cited by petitioner, thereby erroneously considering the Batson claim and therefore that the denial of the petition should be reopened;

(3).- reasserting petitioner's claim brought in his denied habeas petition that his conviction was unconstitutional as the result of counsel's failure to present evidence of an alibi defense; or - asserting that the habeas proceedings were inadequate because the district court did not have before it evidence of petitioner's alibi defense.

Thus based upon how the postjudgment motion is worded, the Rule 60(b) motions in each example seemingly have distinct objectives - the former seeking review of the underlying conviction, while the latter identifies an error in the habeas adjudication as the basis for reconsideration.

In In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004) (en banc), the Sixth Circuit's majority decision implicitly acknowledged as much, providing that "[i]t is only when a petitioner presents a *direct challenge* to the constitutionality of the underlying conviction that the petition should be treated as a second or successive habeas petition." Id. at 181 (emphasis added). In its attempt to identify "true" Rule 60(b) motions, the so-called functional approach advocated by petitioner and amicus recognizes that a successive petition can be disguised as a Rule 60(b) motion. See Pet.Br. at 19; Brief of Abu-Ali Abdur'Rahman, at 20-21. Each, however, fails to address the fact that this disguise is premised on the very basis they advocate for treating the rule and statute as distinct, i.e., language challenging the manner in which the habeas court denied the petition. Moreover, because the ultimate relief sought is readjudication of the basis for which the petition was denied, there is no meaningful difference between the relief sought whether raised in a Rule 60(b) motion or as a successive petition. The only difference is whether the more forgiving standard under Rule 60(b) will permit the reconsideration that § 2244(b)(1) would preclude.

As recognized in Engle v. Isaac, 456 U.S. 107 (1982), the writ entails significant costs: undermining finality of state criminal proceedings by depriving both society and the accused of "the certainty that comes with an end to litigation"; rendering ineffective the judicial system; the loss of deterrence, rehabilitation, and punishment; and infringement of the states' right to enforce its criminal laws. Id. at 127-128; see also Withrow v. Williams, 507 U.S. 608, 698-699 (1993) (O'Connor, J., dissenting) ("[W]e repeatedly have recognized that collateral attacks raise numerous concerns not present on direct review. Most profound is the effect on finality."). It cannot reasonably be argued that the unqualified application of Rule 60(b) does not require disregard for the statutes and rules governing habeas corpus and this Court's jurisprudence in the area, as well as interfere with finality of judgments. See Liljeberg, 486 U.S. at 873 (Rehnquist, C.J., dissenting). And because a civil action typically does not involve review of another court's adjudication, the lack of finality occasioned by use of Rule

60(b) is an even greater affront to AEDPA, as habeas corpus effectively does amount to review of the state court judgment for which the state prisoner is held in custody. See Coleman v. Thompson, 501 U.S. 722, 730 (1991) (addressing the effect of ignoring application of independent and adequate state grounds and granting habeas relief).

Rule 60(b), with the exception of clause (3), provides a means by which a habeas petitioner, whether ultimately successful or not, can avoid the procedural requirements for obtaining review under AEDPA. Sanctioning this practice would unjustifiably invalidate this Court's long-held recognition that federal habeas corpus is different from general civil litigation. Browder, 434 U.S. at 269; Harris, 394 U.S. at 293-294. Indeed, "the Court has performed its statutory task [in defining the scope of the writ] through a sensitive weighing of the interests implicated by federal habeas corpus jurisdiction of constitutional claims determined adversely to the prisoner by the state courts." Kuhlmann v. Wilson, 477 U.S. 436, 447-448 (1986). Blanket availability of Rule 60(b) to habeas proceedings contravenes this Court's habeas jurisprudence and renders the paramount weight Congress gave to the states' interest in finality, as balanced through the promulgation of AEDPA, nugatory.

C. Rule 81(a)(2) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases mandate the limited applicability of Rule 60(b) in habeas cases.

The rules of civil procedure are not automatically applicable to habeas proceedings. Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971). Nor may a court ignore statutes, rules, and precedent specific to habeas corpus in favor of general equitable principles. Lonchar, 517 U.S. at 323. Under Rule 11 of Rules Governing Section 2254 Cases, "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be

applied, when appropriate, to petitions filed under these rules."[19] Accord Fed.R. Civ.P. 1; 81(a)(2) (quoted supra, at 2). As the foregoing discussion demonstrates, Rule 60(b) as a general rule of civil procedure is inconsistent with § 2244(b) under AEDPA. 28 U.S.C. § 2254, Rule 11 thus mandates its application be limited except in the narrowest of circumstances. Cf. Rhines, 2005 U.S. LEXIS 2930 *13-14 ("Any solution to this problem [arising from the 1-year limitation requirement and the lack of exhaustion dismissal rule] must therefore be compatible with AEDPA's purposes.").[20]

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[19] Effective December 1, 2004, Rule 11 was amended and provides as follows: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Pursuant to the Advisory Committee's notes, the amendment "is intended to be stylistic and no substantive change is intended."

[20] Compare infra, at 39-40 (distinguishing Rule 60(b)(3)). Nor does Castro v. United States, 540 U.S. 375 (2003) call for a different result. Castro is not implicated when a court recognizes that a pleading designated a "Rule 60(b) motion" in a federal habeas corpus proceeding is a challenge to a prior determination that relief will not be granted upon claims raised in a habeas petition, and thus rejected for failure to comply with § 2244(b). Limiting Rule 60(b) is not analogous to recharacterizing a pleading as either a § 2254 petition or a § 2255 motion; the Eleventh Circuit did not deprive petitioner of "'the right to have a single petition for habeas corpus adjudicated.'" Adams v. United States, 155 F.3d 582, 584 (2nd Cir. 1998).

> This restriction on re-characterizing post-conviction motions does not apply, however, to a federal court's re-characterization of a prisoner's second or successive motion which collaterally challenges his conviction or sentence in the sentencing court. *See Melton v. United States*, 359 F.3d 855, 857-58 (7th Cir. 2004); *Gonzalez v. Secretary for Dept. of Corrections*, 366 F.3d 1253, 1277 n.10 (11th Cir. 2004).

Ingrati v. United States, 2004 U.S. Dist. LEXIS 13492 *6-7 (D. Del. Jul. 14, 2004) (unpublished).

Consideration, and when warranted, restriction of the applicability of the rules of civil procedure in the habeas corpus context is not foreign to this Court:

In Harris v. Nelson, 394 U.S. 286 (1969), the Court addressed the issue "whether state prisoners who have commenced habeas corpus proceedings in a federal district court may, in proper circumstances, utilize the instrument of interrogatories for discovery purposes." Id. at 288. The petitioner there had relied upon Rule 33 of the Federal Rules of Civil Procedure. Id. at 289. The Court first rejected the notion that habeas corpus as a "civil" proceeding is equivalent to other civil actions. Id. at 294 ("Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense."). Applying Rule 81(a)(2), the Court interpreted the requirement that for the rules to apply under § 2254, habeas practice must have conformed to the rules. Id. "Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate." Id. (footnote omitted). In rejecting the contention that the broad provision for discovery under Rule 33 applies to habeas proceedings, the Court looked to the intent of the Rules' draftsmen, finding that there was "a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings." Id. at 295. Petitioner fails to address Harris.

The Court next took up the issue of the applicability of the civil rules in habeas proceedings in Pitchess v. Davis, 421 U.S. 482 (1975). There, the habeas petitioner filed a motion requesting that the district court modify its conditional writ and replace it with an absolute writ and enjoin the state from retrying petitioner, based upon the destruction of certain evidence. Id. at 485. In affirming the grant of relief by the district court, the court of appeals concluded that petitioner's motion was proper under Rule 60(b), and thus the fact that he failed to exhaust the claim raised therein was irrelevant. Id. at 489. Applying Rule 81(a)(2), and without deciding whether Rule 60(b) applied to habeas proceedings, this

Court reversed on the basis that the exhaustion requirement is statutorily codified under §§ 2254(b) and (c) and thus applies. Id. Petitioner makes no mention of Pitchess.

Lastly, in Browder v. Director, Dept. of Corrections, 434 U.S. 257 (1978), the Court considered "the applicability of Fed.Rules Civ.Proc. 52(b) and 59 in habeas corpus proceedings." Id. at 258.[21] In Browder, the district court granted the writ of habeas corpus; the state did not file a timely motion for new trial under Rule 52 or a timely motion to alter or amend under Rule 59 that would have tolled the time for filing a notice of appeal under F.R.A.P. 4(a). Accordingly, the court of appeals was without jurisdiction over the state's appeal. Id. at 264-265. Respondent there argued that the federal civil procedure rules were "wholly inapplicable on habeas." Id. at 269.[22] In concluding that Rule 81(a)(2) did not preclude application of Rules 52 and 59 under the circumstances, the Court found determinative that

> [n]o other statute of the United States is addressed to the timeliness of a motion to reconsider the grant or denial of habeas corpus relief, and the practice in habeas corpus proceedings before the advent of the Federal Rules of Civil Procedure conformed to the

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[21] To the extent that petitioner relies upon Browder for the proposition that Rule 60(b) does apply in habeas cases, see Pet.Br. at 10, the issue was not before the Court and thus was not decided. See Browder, 434 U.S. at 263 n.8 ("In any event, since respondent has represented to the Court of Appeals and to this Court that his motion was not based on Rule 60(b), and since the District Court did not construe it as such, we find it unnecessary to address the question whether the decision of the Court of Appeals could be sustained on the theory that despite the absence of any reference to Rule 60(b) or any of its specified grounds, the action of the District Court was reversible as an improper denial of relief under that Rule.").

[22] Respondent does not take such an extreme position, instead asserting that the Rules apply to the extent that they do not conflict with habeas statutory provisions or rules specific to § 2254 proceedings. See supra, at 26-32.

practice in other civil proceedings with respect to the correction or reopening of a judgment.

Id. at 270.[23]

Harris, Pitchess, and Browder establish that under certain circumstances the civil rules should not be applied to habeas corpus proceedings. In making that determination, the writ's statutory provisions and rules may not be ignored in favor of equity, Lonchar, 517 U.S. at 323, though urged by amicus Office of the Federal Public Defender for the Middle District of Tennessee, at 2-7. Specific to Rule 60(b), Pitchess stands for the proposition that, to the extent that the rule does apply, it is confined by habeas practice as reflected in habeas statutes, rules, and this Court's jurisprudence. And Browder does not warrant wholesale application of Rule 60(b); in the case of Rules 52 and 59, because the district court's judgment is not deemed final until the 10-day period following entry of judgment has expired, it would defy logic to argue that those rules somehow contravene § 2244(b). Because Rule 60(b) seeks reconsideration of a final adjudication, thereby implicating the balancing of interests made by Congress in its promulgation of § 2244(b), the same cannot be said. Cf. Zimmer St. Louis, Inc. v. Zimmer Co., 32 F 3d 357, 360-361 (8th Cir. 1994) (rejecting application of Rule 60(b) to open judgment to restart running of period to file an appeal, in light of 1991 amendments to F.R.A.P. 4(a)).[24] To permit the use of Rule 60(b) to relitigate the

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[23] As discussed supra, at 12-15, AEDPA has changed that practice.

[24] Applying those principles, a number of circuit courts have also considered the extent that the civil rules apply in habeas proceedings. See, e.g., Martinez v. Johnson, 104 F.3d 769, 772 (5th Cir.) (Fed.R. Civ.P. 41(b) does not conflict with the habeas rules), cert. denied, 522 U.S. 875 (1997); McBride v. Sharpe, 25 F.3d 962, 969-970 (11th Cir.) (en banc) (while Rule 56(c)'s notice provision is applicable in habeas cases in certain circumstance, it was held inapplicable where materials outside of the record were not relied upon), cert. denied, 513 U.S. 990 (1994); United States ex rel. Stachulak, 520 F.2d 931, 933-934 (7th Cir. 1975) (Rule 54(b) not applicable to habeas proceedings where claims seeking both habeas and non-habeas relief were joined), cert. denied, 424

denial of habeas relief on any basis other than a fraud perpetrated upon the district court is to "destroy[] the balance created by" Congress. See 12 Moore, §60.48[6][c].[25]

U.S. 947 (1976).

[25] Petitioner contends however, that for this Court to uphold the Eleventh Circuit's treatment of Rule 60(b) raises "grave and doubtful constitutional questions." Pet.Br. at 32. Petitioner seeks, Pet.Br. at 25-36, to raise an issue not before the lower court. Petitioner failed to properly present the argument below as now made before this Court, instead addressing the Suspension Clause in the context of his due process argument, disavowing any relevance there. En banc Brief of the Appellant, at 27 n.5. Nor was the issue before or decided by the court of appeals. For the same reasons, the second question as presented and argued here by the National Association of Criminal Defense Lawyers, at 23-27, is not properly before this Court. And in respect to petitioner's contention that due process precludes treatment of a Rule 60(b) motion as a successive petition, the same is true. Petitioner apparently believes, however, that it is sufficient that he cited those constitutional provisions under Question 1 in his petition for writ of certiorari, see Cert. Pet. at 17, and relied upon case law that made reference to the Suspension Clause, see id. at 17-19, notwithstanding the order excluding review of Question 2, which presented the issues that petitioner now also relies. The Court has repeatedly held that it will not decide questions improperly before it. Yee v. City of Escondido, 503 U.S. 519, 536-537 (1992).

Additionally, if the issue is before the Court, petitioner's Suspension Clause claim is foreclosed by Felker, 518 U.S. at 658, 664. Just as "[t]he added restrictions which the [Anti-Terrorism and Effective Death Penalty] Act places on second habeas petitions are well within the compass of this evolutionary process, ...", id., 518 U.S. at 664, the same holds true for the limitation period under § 2244(d). Prior to passage of AEDPA, this Court and Congress provided for the dismissal of delayed petitions. See Rule 9(a) of the Rules Governing Section 2254 Cases. That Congress altered the criteria for determining whether a petition was subject to denial as time-barred is simply another example of "a balancing of objectives (sometimes controversial), which is normally for Congress to make, ..." Lonchar, 517 U.S. at 323. And respecting petitioner's reliance upon the fact that it was his first petition that was dismissed, Pet.Br. at 39, he presupposes that the proper application of the law as it stood at the time of adjudication resulting in dismissal constitutes a retroactive suspension of the writ upon a subsequent interpretation of the statute because it might have provided for a different result. As discussed infra, at 40 n.33, there is no basis for such an argument. Similarly, in respect to his due process claim, petitioner fails to cite any precedent for the proposition that procedure due process - i.e., the

Moreover, limiting application of Rule 60(b) in light of AEDPA's § 2244(b) is consistent with those cases holding prior to the enactment of AEDPA that a Rule 60(b) motion could not be used to avoid application of the abuse of the writ doctrine.[26] The pre-AEDPA decisions applied Rule 9(b) of the Rules Governing Section 2254 Cases (effective 1977), which incorporates the Court's prior decisions on successive petitions and abuse of the writ. Slack, 529 U.S. at 486. Thus, petitioner's reliance upon cases failing to take such account is inapposite. See Pet.Br. at 11-12.[27]

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right to notice and an opportunity to be heard, Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2648-2649 (2004) - is violated if, following argument by the parties, a court applies controlling law at the time the case is decided.

[26] See, e.g., Hunt v. Nuth, 57 F.3d 1327, 1339 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996); Jones v. Murray, 976 F.2d 169, 173 (4th Cir. 1992), cert. denied, 505 U.S. 1245 (1993); Williams v. Whitley, 994 F.2d 226, 230 n.2 (5th Cir.), cert. denied, 510 U.S. 1014 (1993); McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996), cert. denied, 520 U.S. 1257 (1997), overruled on other grounds, In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004) (en banc); Gant v. United States, 1993 U.S. App. LEXIS 26819 *2-3 (7th Cir. Oct. 5, 1993) (unpublished), cert. denied, 510 U.S. 1183 (1994); Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992), cert. denied, 508 U.S. 916 (1993); Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993); Lindsey v. Thigpen, 875 F.2d 1509, 1511-1512, 1515 (11th Cir. 1989).

[27] In addition, petitioner's citation to cases where the state sought Rule 60(b) relief, including Booker v. Singletary, 90 F.3d 440 (11th Cir. 1996) and Ritter v. Smith, 811 F.2d 1398 (11th Cir.), cert. denied, 483 U.S. 1010 (1987), are irrelevant, as the state does not file a habeas petition and thus is not governed by § 2244(b). Obviously, then, a state's motion for reconsideration does not conflict with AEDPA as the same considerations are not implicated.

II.

A Rule 60(b) motion challenging the non-technical procedural denial of habeas corpus relief seeks review of the merits of the adjudication of that petition.

A. Denial of a petition for writ of habeas corpus as time-barred, unlike, for example, a dismissal for lack of exhaustion, for a premature claim, or failure to properly complete the requisite habeas form, is not a technical defect but constitutes a judgment on the merits.

In Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), the Court held that a habeas petition dismissed without prejudice because the claim was premature did not constitute adjudication of the claim to preclude its reassertion. Id. at 644-645. Similarly, in Slack v. McDaniel, 529 U.S. 473 (2000), a dismissal without prejudice because the substantive claims had not been exhausted in state court did not constitute a ruling on the merits such that their reassertion would be successive. Id. at 486-487. Therefore, in circumstances where procedural dismissals were disposed upon technical grounds, the rulings did not preclude consideration of those same claims at some future time.[28]

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[28] See also Sanders v. United States, 373 U.S. 1, 19 (1963) (dismissal based upon deficient pleading did not bar subsequently filed § 2255 petition). Other examples of technical procedural dismissals include, for example, failure to comply with the pleading form (28 U.S.C. § 2254, Rule 2(c)), lack of jurisdiction, failure to pay the filing fee or to file for in forma pauperis status (28 U.S.C. § 2254, Rule 3), or a withdrawn petition. See Singleton v. Norris, 319 F.3d 1018, 1023 (8th Cir.) (en banc) (later petition not barred under § 2244(b) because competency to be executed claim did not arise until scheduling of execution and involuntary medication order), cert. denied, 540 U.S. 832 (2003); Turner v. Terhune, 78 Fed. Appx. 29, 30 (9th Cir. Sept. 8, 2003) (unpublished) (first petition dismissed for failure to name the state custodian, thus not a bar to filing a later petition); Barnes v. Briley, 43 Fed. Appx. 969, 973 (7th Cir. Jul. 10, 2002) (unpublished) (failure to pay $5.00 filing fee "at the purely technical end

Those circumstances are, of course, quite distinct from an adjudication finally disposing of a petition. The Court's opinions in Stewart and Slack recognize by strong implication that not every adjudication of a habeas petition on procedural grounds is "on the merits." Otherwise the Court need not have identified the procedural dismissals as "technical." Had the Court intended otherwise, all adjudications resulting in a dismissal on procedural grounds, without distinction, would not implicate § 2244(b) for lack of a merits determination. The basis for the distinction is this: while a technical procedural defect in a habeas proceeding can be remedied and anticipates subsequent litigation upon the same claims, a denial on non-technical procedural grounds forever forecloses litigation of those underlying claims. Plaut, 514 U.S. at 228 ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits."); cf. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 502-506 (2001) (in federal civil proceeding based upon diversity jurisdiction, dismissal on state statute of limitations grounds constituted a "judgment on the merits" barring refiling of same claim in federal district court, while res judicata would not preclude refiling of the claim in state court).

Accordingly, a judgment on the merits results whether it be a determination that the underlying constitutional claims are not subject to review due to a non-technical procedural ground, e.g., the petition is time-barred or the claims are procedurally defaulted, or that the underlying claims were substantively reviewed and denied. Both types of rulings are final dispositions of the habeas petition that give rise to appellate jurisdiction (assuming the filing of a timely notice of appeal and issuance of a certificate of

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of the spectrum. . . ."); see also Jeffrey, Article: Successive Habeas Corpus Petitions And Section 2255 Motions After The Antiterrorism And Effective Death Penalty Act Of 1996: Emerging Procedural And Substantive Issues, 84 Marq. L.Rev. 43, 73-91 (2000).

appealability). Conversely, a dismissal on a technical procedural basis does not provide for appellate review. Moore v. Mote, 368 F.3d 754, 755 (7th Cir. 2004) ("The district court's order dismissing the case without prejudice is not final because it explicitly contemplates the court's continuing involvement in the case. . . ."); see also Hunt v. Hopkins, 266 F.3d 934, 936-937 (8th Cir. 2001) (circuit court was without appellate jurisdiction of district court's order permitting habeas petitioner to file a third amended petition; while second petition was dismissed, the action was not). It is this distinction between the effect of technical as compared to non-technical dispositions of habeas petitions that explains the Court's decisions in Stewart and Slack and renders petitioner's reliance upon those opinions in support of his position misplaced.[29] See Pet.Br. at 29.

The Eleventh Circuit's treatment of petitioner's Rule 60(b) motion is true to the rationale underlying Slack and Stewart. Moreover, Gonzalez is consistent with both pre-AEDPA and post-AEDPA cases holding that the denial or termination of a habeas petition on procedural default grounds is a ruling on the merits for purposes of evaluating whether a subsequent pleading is a successive petition.[30] See, e.g., Harvey v. Horan, 278 F.3d 370, 379-380 (4th Cir. 2002); In re: Cook, 215 F.3d 606, 607-608 (6th Cir.

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[29] Neither Slack nor Stewart were before the Court from an appeal that the district court had disposed of the petitions as unripe or for lack of exhaustion. Instead, Slack's subsequent habeas petition had been dismissed as an abuse of the writ. Slack, 529 U.S. at 478-479. In Stewart, the state sought a writ of certiorari after the circuit court held that § 2244(b) did not apply to Stewart's claim under Ford v. Washington, 477 U.S. 399 (1986) that had previously been dismissed and remanding the case back to the district court. Stewart, 523 U.S. at 640-641.

[30] Because an actual statute of limitations period did not apply to habeas corpus proceedings prior to enactment of AEDPA, there obviously would not exist case law specific to § 2254 holding that a denial of habeas petition as time-barred is a ruling on the merits for purposes of whether a new petition is successive.

2000);[31] Carter v. United States, 150 F.3d 202, 205-206 (2nd Cir. 1998); Caton v. Clarke, 70 F.3d 64, 65 (8th Cir. 1995), cert. denied, 517 U.S. 1173 (1996); Hawkins v. Evans, 64 F.3d 543, 547 (10th Cir. 1995); Bates v. Whitley, 19 F.3d 1066, 1067 (5th Cir. 1994); Howard v. Lewis, 905 F.2d 1318, 1322-1323 (9th Cir. 1990).[32]

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[31] The majority in In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004) (en banc) failed to address this principle that a denial on procedural grounds is a final adjudication and its own precedent so holding, see In re Cook, 215 F.3d at 608, instead citing Cook solely for the proposition that an unexhausted claim is deemed procedurally defaulted where the petitioner cannot return to state court to properly exhaust the claim. In re Abdur'Rahman, id., at 186.

[32] Petitioner, however, relies upon cases reaching a contrary result, Pet.Br. at 28-30, notwithstanding that those cases take no account of the distinction between a technical procedural dismissal versus a non-technical procedural denial of the petition, thus failing to treat the latter as an adjudication on the merits of the petition. See, e.g., In re Abdur-Rahman, 392 F.3d 174 (6th Cir. 2005) (en banc) (the majority gave no consideration to this Court's decisions in Calderon, Slack, or Stewart); Guyton v. United States, 23 Fed. Appx. 539 (7th Cir. Sept. 26, 2001) (unpublished) (discussing the issue in dicta); Blackmon v. Money, 27 Fed. Appx. 543 (6th Cir. Dec. 10, 2001) (unpublished) (successive issue not addressed by the court). Petitioner also cites district court decisions for the proposition that they "have also followed the precedent of this Court's analytical formulation." Pet.Br. at 29-30. To the contrary, those decisions necessitate the opposite result in light of this Court's opinion in Calderon, as the principle opinion of those cases relied upon pre-Calderon case law and approved the use of Rule 60(b) as analogous to a federal appellate court's power to recall its mandate, Tal v. Miller, 1999 U.S. Dist. LEXIS 652 *3 (S.D.N.Y. Jan. 27, 1999) (unpublished), while the others specifically relied upon the reasoning in Tal. See Devino v. Duncan, 215 F.Supp.2d 414, 418 (S.D.N.Y. 2002); Reinoso v. Artuz, 1999 U.S. Dist. LEXIS 7768 *5 (S.D.N.Y. May 25, 1990) (unpublished); Robles v. Senkowski, 1999 U.S. Dist. LEXIS 11565 *4-5 (S.D.N.Y. Jul. 30, 1999) (unpublished); see also Vega v. Artuz, 2002 U.S. Dist. LEXIS 17204 *10-13 (S.D.N.Y. Sept. 12, 2002) (unpublished) (propriety of Rule 60(b) motion based upon equity). Other opinions similarly decided suffer from the same analytical failing. See Pridgen v. Shannon, 380 F.3d 721 (3rd Cir. 2004) (no reference made to Calderon, Slack, or Stewart), cert. denied, 2005 U.S. LEXIS 1587 (Feb. 22, 2005); Hamilton v. Newland, 374 F.3d 822, 825 (9th Cir. 2004) (broadly asserting that "Rule 60(b) is the appropriate rule to invoke when one wishes a court to *reconsider claims it has already decided*.") (emphasis added)), cert. denied, 2005 U.S. LEXIS 2307 (Mar. 7, 2005); compare Muniz v. United States, 236 F.3d 122, 128 (2nd Cir. 2001) (in applying Slack, the court

B. A Rule 60(b) motion seeking review of the denial of habeas corpus relief on a non-technical procedural basis is the functional equivalent of a successive petition, barred under § 2244(b)(1).

An adjudication that the underlying constitutional claims are not subject to review, now or in the future, is a denial on non-technical grounds and thus an adjudication on the merits. Any subsequent petition attempting to raise the same constitutional claims challenging the state court judgment of conviction and sentence would be successive, for the reason that the new petition is one seeking to relitigate the disposition of the same claims raised in a previous petition determined to foreclose future consideration of those claims. See Kuhlmann, 477 U.S. at 445 n.6 (citing Sanders, 373 U.S. at 15-17). Section 2244(b)(1) as amended clearly precludes this. To permit a habeas petitioner to evade that result through use of a Rule 60(b) motion is in clear contravention of the statutory scheme.

In addition to pre-AEDPA treatment of non-technical habeas adjudications and subsequent petitions, supra, at 32 & n.26, Congress' amendment to § 2244(b) removes any doubt that a denial of a habeas petition does not require that adjudication of the underlying constitutional claims must be "on the merits." Formerly § 2244(b) provided in pertinent part:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody

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treated a dismissal pursuant to § 2244(d) as a "technical procedural" defect because the dismissal was deemed erroneous based upon a contrary subsequent interpretation of the limitation statute, and also expressing as a particular concern that the habeas petitioner, through filing an application for a certificate of appealability, had sought a timely appeal asserting an erroneous determination under § 2244(d), wherein application of two decisions that had been released by the appellate court *after the petition was dismissed but within the time for appeal* would have resulted in the petition being deemed timely filed).

> pursuant to the judgment of a State court has been denied by a court of the United States . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ. . . .

28 U.S.C. § 2244(b) (1994). As amended by AEDPA, § 2244(b) excludes all reference to a merits determination of a material factual issue, providing that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." § 2244(b)(1). Similarly, Rule 9 of the Rules Governing Section 2254 Cases, amended effected December 1, 2004, also reflects this change: Rule 9 no longer makes reference to whether "the prior determination was on the merits . . ." as was the case with Rule 9(b), now providing that "[b]efore presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4)."

Moreover, had Congress intended otherwise, either the statute of limitations would not have been created and the procedural default doctrine would have been renounced, or the "one bite at the apple" would have included a qualification: except when the petition is denied for any reason but substantive review of the underlying constitutional claims. Congress took neither tack. Thus AEDPA requires "an adjudication of all the claims . . . ," Martinez-Villareal, 523 U.S. at 643, not substantive review of the claims raised by a habeas petitioner. To hold otherwise, i.e., if a non-technical procedural final disposition of a habeas petition does not implicate § 2244(b)(1), then a habeas petitioner could endlessly file the same petition previously denied as time-barred or that the claims were procedurally defaulted, hopeful that such judge-

shopping might ultimately result in relief, or at the least incur continuous delay. Cf. Rhines, 2005 U.S. LEXIS 2930 *16 (recognizing the potential for abuse of the stay and abeyance procedure in habeas litigation).

III.

A subsequent interpretation by this Court of the procedural rule upon which a lower court denied a habeas petition does not impinge the integrity of that lower court's judgment.

Unlike the case at hand, there are circumstances in which Rule 81(a)(2) and Rule 11 of the Rules Governing Section 2254 Cases do not dictate the inapplicability of Rule 60(b). The government's procurement of a judgment through fraud certainly would not qualify as the "one bite" at the habeas apple that Congress intended with passage of AEDPA. Cf. Abel v. Tinsley, 338 F.2d 514, 515-516 (10th Cir. 1964) (former habeas statutory provisions did not provide any procedure for relief from judgment the result of fraud; Rule 81(1)(2) did not preclude use of Rule 60(b)(3)). Perpetration of fraud upon the district court to defeat a petition for writ of habeas corpus impinges the integrity of the court. Integrity is not synonymous with mistaken or erroneous, but rather with "probity, honesty, and uprightness." Black's Law Dictionary 727 (5th ed. 1979). The judgment is not truly a judgment when the successful party engages in misrepresentations undetectable on the record, presents false testimony, or other unfair litigation tactics aimed at subverting the litigation process itself. See Schlesinger v. Councilman, 420 U.S. 738, 747 (1975) ("A judgment, however, is not rendered void merely by error . . . [I]t means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences."); see also Hazel-Atlas Glass Co., 322 U.S. at 245 ("[W]here the occasion has

demanded, where enforcement of the judgment is 'manifestly unconscionable,' they [courts of equity] have wielded the power without hesitation.") (internal citation omitted).

Petitioner's case, however, does not present any such circumstance. Even if the district court decided petitioner's case based upon an understanding of § 2244(d)(2) that this Court's subsequent decision reflects was incorrect, a fact Respondent disputes,[33] at most the judgment would be deemed incorrect.

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[33] Because petitioner's conviction became final well before the effective date of AEDPA, the one-year limitation period began running on April 24, 1996. While petitioner filed a state postconviction application on November 25, 1996, § 2244(d)(2) did not toll the limitation period: the collateral pleading was filed outside of the two-year limitation under Florida Rule of Criminal Procedure 3.850(b), and because the facts were previously known to petitioner, the untimely postconviction motion was not subject to any exception to otherwise render it timely filed. Drew, 297 F.3d at 1285 (citing Artuz, 531 U.S. at 9 n.2), cert. denied, 537 U.S. 1237 (2003). Thus, the pleading was not "properly filed" under § 2244(d)(2) and the one year continued to run from November 25, 1996 to April 23, 1997, when the limitation period ran. Petitioner's federal petition, filed on June 23, 1997, was untimely and properly denied as such. Petitioner's reliance upon Artuz in his Rule 60(b) motion simply was and remains inapplicable. But see infra, at 44.

Albeit petitioner argues that his petition would be deemed timely under Artuz, Pet.Br. at 14, he made no attempt to establish that before the Eleventh Circuit nor does so now before this Court. As demonstrated above, that simply is not the case. Nor does the fact that petitioner's first state Rule 3.850 motion was before the state courts from August 8, 1994 to February 8, 1995 effect the limitation period, as AEDPA had not yet been enacted. And to the extent that petitioner may believe that the period between the affirmance of the summary denial of the first collateral motion and the filing of the second is tolled under § 2244(d)(2), this Court has not so held. Compare Carey v. Saffold, 536 U.S. 214, 219-220 (2002) (for purposes of § 2244(d)(2), a petition is pending from the time of filing in the lower court through disposition of any appeal filed therefrom, i.e., final resolution).

Petitioner's contention that the lower courts erroneously denied his application for COA from the denial of his petition is also a misstatement. After having received a certificate of appealability from the district court that did not identify which, if any, issues petitioner had made a substantial showing of the

Petitioner touts a theme sounding in equity, arguing that for him to be bound by what was controlling Eleventh Circuit law at the time his habeas petition was adjudicated and finally determined is unfair. But as this Court has repeatedly pronounced, habeas corpus is governed by the statutes, rules, and precedent specific to habeas corpus; equitable considerations cannot and should not serve as a substitute. Lonchar, 517 U.S. at 323; Calderon, 523 U.S. at 554. The issue at hand is whether a general rule of civil procedure for which its purpose conflicts with habeas corpus may nonetheless be invoked for reconsideration of a judgment that was proper at the time it was rendered.

The integrity of that prior judgment is not implicated. Otherwise, if a judgment wrongly decided is sufficient to impinge the district court's integrity, see In re Abdur'Rahman, 392 F.3d at 180, then any decision would be subject to Rule 60(b) review, whether the disposition rested upon procedural or substantive resolution of the constitutional claims. Fraud necessitates some deliberate, wrongful conduct and simply is not equivalent to mistake, inadvertence, any other reason justifying relief, etc. Moreover, clause (b)(6) is not interchangeable with the others. Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 393 (1993). General allowance of Rule 60(b) thus contravenes § 2244(b)(1) by permitting reconsideration

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denial of a constitutional right as mandated by 28 U.S.C. § 2253(c), returned by the Eleventh Circuit to the district court in an unpublished opinion dated October 28, 1999, under cause number 98-5545-FF, styled Aurelio O. Gonzalez v. Department of Corrections, the district court, on December 10, 1999, denied COA, simply reciting the standard of § 2253(c). J.A. 4. The order of the district court did not in any way indicate that the application would not be granted on the time-bar issue because it was a procedural denial rather than raising a constitutional issue. Nor would Eleventh Circuit precedent have precluded such review outright. Henry v. Department of Corrections, 197 F.3d 1361, 1364 (11th Cir. 1999). Petitioner did not thereupon seek a certificate of appealability from the court of appeals, but instead submitted to that court a "Petition for Rehearing" under cause number 98-5545-FF, on or about April 18, 2000, requesting reconsideration of the COA. With a letter dated April 26, 2000, that petition was returned to the petitioner having not been filed.

of the same claims and § 2253(b), because the petitioner need not obtain a certificate of appealability to receive additional review.

IV.

Retroactive application of a newly announced interpretation of a habeas procedural statute elevates the import of habeas procedure beyond that of new rules of constitutional law attendant to criminal procedure.

This Court's interpretation of § 2244(d), or any other statute for that matter, does not constitute an intervening change in the law. Rather, "[i]t is this Court's responsibility to say what a statute means, and *once the Court has spoken*, it is the duty of other courts to respect that understanding of the governing rule of law." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312 (1994) (emphasis added). Thus, the fact that prior to this Court's interpretation of Artuz the Eleventh Circuit interpreted § 2244(d)(2) differently is not a change in the law. That is, the Court's interpretation of 28 U.S.C. § 2244(d)(2) did not overrule any prior decision of the Court, but instead resolved a conflict between the circuit courts of appeal as to the proper interpretation of the statutory provision. When "[the] Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." Rivers, 511 U.S. 298, 313 n.12 (1994). At most, then, the Eleventh Circuit incorrectly interpreted the meaning of a "properly filed" state postconviction relief motion. Accordingly, petitioner's argument distinguishing the applicability of Teague v. Lane, 489 U.S. 288 (1989), Pet.Br. at 44-45 n.23, presents a nonissue. Instead, Teague and this Court's retroactivity jurisprudence demonstrate that petitioner seeks greater retroactivity rights in connection with procedural rules pertaining to the habeas proceeding itself, as compared to retroactivity with new rules of constitutional law relative to the underlying conviction and/or sentence. Petitioner would have the Court elevate habeas corpus to

the "main event." For the Court to adopt that position is to turn a deaf ear to the principle that the actual existence of a statute "'is an operative fact and may have consequences that cannot justly be ignored. . . .'" Id. at 308 (internal citation omitted). Petitioner cites no support in furtherance of a contrary result.

Since its enactment, this Court has had occasion to interpret AEDPA's provisions. See, e.g., Rhines v. Weber, ___ S.Ct. ___, 2005 U.S. LEXIS 2930 (No. 03-9046) (Mar. 30, 2005) (whether a district court may issue a stay and hold a case in abeyance pending exhaustion of state court remedies); Williams v. Taylor, 529 U.S. 362, 405 (2000) (§ 2254(d)); Artuz v. Bennett, 531 U.S. 4 (2000) (§ 2244(d)(2) - whether a state postconviction application containing procedurally barred claims is "properly filed"); Duncan v. Walker, 533 U.S. 167 (2001) (§ 2244(d)(2) - whether a federal habeas petition tolls the limitation period); Carey v. Saffold, 536 U.S. 214 (2002) (§ 2244(d)(2) - whether a state collateral proceeding is "pending" between the time the lower court issues its decision and an appeal is filed). The Court also currently has cases pending requiring interpretation of AEDPA. See Pace v. DiGuglielmo, No. 03-9627 (whether an untimely state collateral application is "properly filed" as contemplated under subsection (d)(2); argued Feb. 28, 2005); Dodd v. United States, No. 04-5286 (whether the one-year limitation period under § 2255 ¶6(3), identical to that in § 2244(d)(1)(C), begins when a new rule of constitutional law is made retroactive or when the Court simply recognizes a new right; argued Mar. 22, 2005). Other questions concerning the construction of particular AEDPA provisions may eventually require this Court's attention, although the Court, has, to date, denied certiorari. For example, the Court has declined to determine whether § 2244(d)(2) applies to the period from which certiorari could have been and/or was sought following the affirmance of denial of state postconviction or collateral relief. See infra, at 44-45 n.34 ¶2.

Each of these decisions interpreting federal habeas law provides fertile ground for reopening the denial of habeas relief if

Rule 60(b) is a viable alternative to the absolute bar under § 2244(b)(1). For example, in petitioner's case, were the Court to decide in Pace v. DiGuglielmo, No. 03-9627 (argued Feb. 28, 2005), that an untimely state collateral application is "properly filed" as contemplated under § 2244(d)(2), petitioner would of course seek Rule 60(b) relief again, albeit twenty-three years after he pled guilty.[34]

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[34] Other examples abound. Additional cases where a Rule 60(b) motion would likely be filed if the Court were to conclude that the time is tolled upon the filing of an untimely state petition would include: Williams v. Sims, 390 F.3d 958 (7th Cir. 2004); Wade v. Battle, 379 F.3d 1254 (11th Cir. 2004); Merritt v. Blaine, 326 F.3d 157 (3rd Cir.), cert. denied, 540 U.S. 921 (2003); Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003); Stafford v. Thompson, 328 F.3d 1302 (11th Cir. 2003); Johnson v. Wolfe, 41 Fed. Appx. 733 (6th Cir. Jun. 21, 2002) (unpublished); Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002), cert. denied, 538 U.S. 1001 (2003); Wright v. Norris, 299 F.3d 926 (8th Cir. 2002); Allen v. Mitchell, 276 F.3d 183 (4th Cir. 2001); Israfil v. Russell, 276 F.3d 768 (6th Cir. 2001), cert. denied, 535 U.S. 1088 (2002); Williams v. Cain, 217 F.3d 303 (5th Cir. 2000); Morgan v. Money, 2000 U.S. App. LEXIS 1914 (6th Cir. Feb. 8, 2000) (unpublished); Hernandez v. Peirson, 2000 U.S. App. LEXIS 30179 (7th Cir. Nov. 27, 2000) (unpublished), cert. denied, 532 U.S. 1068 (2001); Freeman v. Page, 208 F.3d 572 (7th Cir.), cert. denied, 531 U.S. 946 (2000); Romaine v. Woods, 2000 U.S. App. LEXIS 18606 (9th Cir. Jul. 26, 2000) (unpublished); Webster v. Moore, 199 F.3d 1256 (11th Cir.), cert denied, 531 U.S. 991 (2000); Palmer v. Corcoran, 1999 U.S. App. LEXIS 23336 (4th Cir. Sept. 24, 1999) (unpublished); Kiel v. Scott, 1999 U.S. App. LEXIS 2500 (10th Cir. Feb. 18, 1999) (unpublished), cert. denied, 528 U.S. 1115 (2000); Conner v. Lemaster, 1999 U.S. App. LEXIS 2495 (10th Cir. Feb. 18, 1999) (unpublished). The foregoing list is without consideration of those district court § 2244(d)(2) dismissals in which a certificate of appealability was not sought and/or obtained.

One would also expect to see Rule 60(b) motions in every circuit but the Sixth Circuit, see Abela v. Martin, 348 F.3d 164, 169-173 (6th Cir. 2003) (en banc) (the only circuit holding that the time to seek certiorari following denial of state collateral proceeding is tolled irrespective of whether or not a writ is filed), cert. denied, 124 S.Ct. 2388 (2004), if the Court were to accept for review and interpret § 2244(d)(2) to include the time in which a petition for writ of certiorari could have been and/or was sought following the denial of state postconviction relief. See, e.g., Smaldone v. Senkowski, 273 F.3d 133, 136-138 (2nd Cir. 2001), cert. denied, 535 F.3d 1017 (2002); Miller v. Dragovich, 311 F.3d 574, 578-580 (3rd Cir. 2002), cert. denied, 540 U.S. 859 (2003); Crawley v. Catoe, 257 F.3d 395, 398-401 (4th Cir. 2001), cert. denied, 534 U.S. 1080 (2002); Ott v. Johnson,

The point is not whether habeas petitioners will ultimately be successful in reopening the § 2254 proceedings as argued by petitioner, Pet.Br. at 45-46, but the very existence of an avenue inconsistent with AEDPA that reinstates the very delay Congress intended to foreclose. The filing of Rule 60(b) motions require the government to respond, petitioners then file a reply, district courts must review and rule upon the motions, only to be followed by attempts to appeal from denied motions. To assert that the availability of the general civil rule will have minimal effect on habeas proceedings ignores the reality of present conditions. Indeed, the lower federal courts in each of the circuits are routinely required to determine if a Rule 60(b) is in actuality a successive petition.[35] This situation violates AEDPA by permitting frivolous

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192 F.3d 510, 512-513 (5th Cir. 1999), cert. denied, 529 U.S. 1099 (2000); Gutierrez v. Schomig, 233 F.3d 490, 491-492 (7th Cir. 2000), cert. denied, 532 U.S. 950 (2001); Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir.), cert. denied, 532 U.S. 998 (2001); Dukes v. Garcia, 53 Fed. Appx. 458, 459 (9th Cir. Dec. 13, 2002) (unpublished); Rhine v. Boone, 182 F.3d 1153, 1155-1156 (10th Cir. 1999), cert. denied, 528 U.S. 1084 (2000); Coates v. Byrd, 211 F.3d 1225, 1226-1227 (11th Cir. 2000), cert. denied, 531 U.S. 1166 (2001).

Similarly, the same may be said now that this Court has held that a district court does not abuse its discretion in granting a stay and holding the federal habeas proceedings in abeyance in order for a petitioner to return to state court for exhaustion purposes, to the extent that a petition previously had been dismissed and then held untimely upon refiling. See Rhines, 2005 U.S. LEXIS 2930 *16-18. Likewise if the Court were to hold that the one-year limitation period under § 2255 ¶6(3) begins when a new rule of constitutional law is actually held retroactive, rather than just announced. See Dodd v. United States, No. 04-5286 (argued Mar. 22, 2005).

[35] A query search on the LexisNexis legal website with the terms "successive" and "60(b)" within the same paragraph returned over 500 reported cases. The frequency in which Rule 60(b) motions are filed in habeas proceedings presently is without this Court's imprimatur. The reported cases reaching the circuit courts of appeal, over 300, typically concern whether the lower court erred in treating the Rule 60(b) motion as a successive petition; those courts must then first determine whether appellate jurisdiction is vested.

pleadings,[36] and defeats the states' substantial interest in finality of criminal judgments.[37] "It goes without saying that, at some point, judicial proceedings must draw to a close and the matter deemed conclusively resolved; no society can afford forever to question the correctness of its every judgment." Withrow, 507 U.S. at 698-699 (O'Connor, J., dissenting).

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[36] Even petitioner recognizes that very few such motions have culminated in relief. Pet.Br. at 45-46. That net result, however, obviously has not precluded or otherwise discouraged habeas petitioners from seeking reconsideration of the denial of habeas relief. See supra, at 45 n.35.

[37] In 1995, the average time for processing of a state prisoner's habeas petition was 280.9 days. U.S. Dept. of Justice, Federal Justice Statistics Program, Bureau of Justice Statistics, J. Scalia, Prisoner Petitions in the Federal Courts, 1980-96, at 7-8 (Oct. 1997, NCJ-164615), available online at http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfc96.pdf. And based upon the increased number of habeas filings in recent years, see U.S. Dept. of Justice, Bureau of Justice Statistics, J. Scalia, Special Report - Prisoner Petitions Filed In U.S. District Courts, 2000, with Trends 1980-2000, at 1 (Jan. 2002, NCJ-189430) (increase of 13 to 17 per 1,000 inmates of state prisoner habeas petition filings between 1995 and 2000), available online at http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf, in conjunction with the continued shortage of federal judges, the likelihood that the situation has improved is nil.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CHRISTOPHER M. KISE
Solicitor General

CASSANDRA K. DOLGIN*
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

**Counsel of Record*